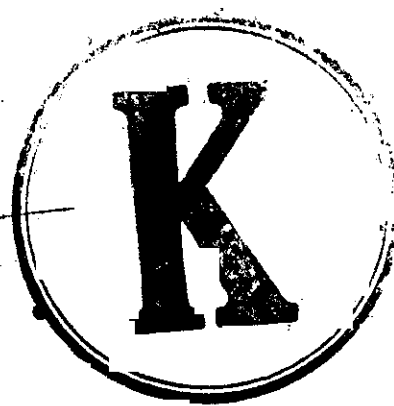


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File No. O. G. of I/42

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Legal DEPARTMENT
A BRANCH

Subject:—

Opinions under the
Govt. of India Act, 1935

P 97
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File No. O. G. of I/42
Std. Sect. Slip. 21 A

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Office of the R.L.A.

The first question raised for the consideration of the R.L.A. is regarding the repeal of the Public Servants (Inquiries) Act, 1850. The Act provides a special procedure for holding enquiries into the behaviour of certain public servants. The provisions of this Act are independent of the provisions of rule 55 of the Classification Rules and an enquiry into the conduct of a public servant to which the Act applies may be held under the provisions of this Act or those of rule 55 of the Classification Rules. It is true that under section 15 of the Act the defence of the accused if made orally cannot be brought on record and consequently the accused is likely to be prejudiced if the final authority when awarding punishment is not in possession of the facts and contentions urged in defence. But this can hardly be regarded as a serious defect as the accused has under the very same section the option to make his defence in writing which must be brought on record. The Act moreover contains certain important provisions which are not contained in the Classification Rules, namely, those contained in sections 8 and 9 of the Act conferring powers on the Commissioners holding the inquiry to summon and compel witnesses to attend before them and to compel the production of documents which may be necessary for the purpose of enquiry. These provisions are useful and in certain cases it may be necessary to utilize them and for this purpose to hold the enquiry under the Act instead of under the Classification Rules. The legal position as explained in paragraph 2 of the Annexure to the Government of India letter at page 4 ante is correct and from the legal point of

view it does not appear necessary to repeal the Act.⁴

2.¹ The second question for the consideration of the R.L.A.³

is whether the proposed rules for holding enquiries into the

conduct of public servants should contain a provision that the accused officer should be supplied with a copy of the report of the Federal Public Service Commission upon the case and given an opportunity of submitting any representation that he may wish to make upon it before the Government of India forwards the papers ~~to make a report to the Government of India~~ with its recommendations for the orders of the Secretary of State.⁷

As stated in paragraph 4 of the Annexure at page 5 ante, under section 266 of the Government of India Act, the Federal Public Service Commission is statutory body of advisers of the Government of India in regard to disciplinary matters and the reports made by it are in the nature of advice tendered by it to the Government of India.

Although there is nothing in the Act which precludes a copy of such advice given by the Public Service Commission being supplied to the accused and an opportunity being given to him to submit a representation on it before the final orders are passed,⁸ such action may not be considered appropriate, in view of the nature of the communication which the Public Service Commission makes to Government.⁹ The question, however, is an administrative one for the P & S.D.¹⁰ to decide.¹¹

3.² The next question for the consideration of the R.L.A.³ is whether having regard to the Provisions of section 240(3) of the Government of India Act,¹² it is necessary to provide in the rules that after an enquiry against an officer has been completed, the accused should be called upon to show cause against the penalty proposed to be imposed against him. Section 240(3) of the Government of India Act provides that no person shall be dismissed or reduced

and until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It is possible to hold that the section requires that after an enquiry is held and in case it is proposed to impose a penalty of dismissal or reduction the accused should be given a reasonable opportunity of showing cause against such penalty before the order imposing it on him is passed. The question is, however, not free from doubt. It appears that the Government of India has already referred the question to the Secretary of State for an authoritative ruling and it does not therefore appear necessary to consider it further.

4. The other issues involved in the case which are discussed in the P.A.S.D. note at pages 7-20 only appear to be purely administrative and consequently no remarks from the H.L.A. are called for on them.

O.C.

Sd/-

Comptroller of Legal Affairs.

U.P. to P.A.S.D., No 37 Conf., dated the 26th January

EE/O-4

The first question raised for the Remembrance of Legal Affairs' consideration is whether the Governor of Sind or the Governor of Bombay is the authority competent to grant leave to Sir Shah Nawaz Bhutto. Sir Shah Nawaz Bhutto has been appointed to be the member of the Commission by the Governor of Sind. Under the Bombay and Sind Public Service Commission (Conditions of Service) Regulations certain powers relating have been reserved to the Governor of Sind in the case of the members appointed by him e.g. regulations 8 and 9. But there is no power reserved to the Governor of Sind in the matter of granting leave to such member. The question will therefore be governed by the arrangement referred to in paragraph 2 of the Preamble to the Regulations according to which the Governor of Sind has agreed that the functions relating to the commission shall be discharged by the Governor of Bombay. In view of this arrangement the Governor of Bombay would appear to be the competent authority to grant leave to Sir Shah Nawaz Bhutto. The view taken by the Chairman of the Commission in paragraph 2 of his letter dated 23rd January 1942 at page 1 into is correct.

2. The next question raised for the Remembrance of Legal Affairs' consideration is whether it is necessary to fill up the vacancy caused by the absence on leave of Sir Shah Nawaz Bhutto. Regulation 9 lays down that a vacancy caused by absence on leave shall be filled (a) in the case of the Chairman by the Governor with concurrence of the Governor of Sind, (b) in the case of any other Member by the Governor by whom such Member was appointed. The Commission is a

statutory body consisting of a Chairman and two other members (vide Regulation 3). There is no provision in the Regulations empowering the Commission to carry on its functions in the absence on leave or otherwise of any of its members and it is doubtful if in the absence of such a provision the Commission can function without its full complement. It would be desirable to amend the Regulation as suggested in paragraph 3 of the Political and Services Department note dated 26th January 1942 at p. 7 ante.

Ed/-

Remembrancer of Legal Affairs.

U.R. to P and S.D., No 1012, dated 3rd February, 1942.

Er/9/4

The question referred to the R.L.A. for consideration is whether section 297 of the Government of India Act, 1935, affects the right of the Provincial Government to ban exports from any local area in the Province under the Bombay Fodder and Grain Control Act, 1939.

2. Sections 5 of the Bombay Fodder and Grain Control Act, 1939, was framed in consultation with the Advocate General (a copy of whose opinion is attached).¹ It gives power to the Provincial Government to direct by notification that no person shall remove from the local area mentioned in the notification fodder or grain of any kind without permission in writing of the Collector.² The section has been so enacted as to make it clear that this power can be exercised by the Provincial Government only when a state of famine or scarcity prevails in any local area in the Province and on being satisfied that it is necessary for the relief of poor persons or for the protection of agriculture or for the preservation of public health in the famine or scarcity area that the removal of fodder or grain of any kind from such area or from any other local area should be restricted.³ It is manifest from the plain wording of the section that the legislative power exercised is only under entries 14, 20 and 32 in List II and that the restriction on export is not being imposed by virtue of entries 27 and 29 relating to "trade and commerce" or "production, supply and distribution of commodities".⁴ The section as enacted is intra vires of the Provincial Legislature and does not attract the provisions of section 297 of the Government of India Act.⁵ It would, therefore, be competent to the Provincial

Government under the said section to prohibit exports of any fodder or grain from any local area provided that a state of famine or scarcity has by notification been declared to prevail in that area or any other local area in the Province.

Sd/-
a.c.
Remembered of Legal Affairs.

U.R. to G.D., No. 1103, dated the 6th February 1942

It appears that under the Octroi Rules framed by it the District Local Board, Ratnagiri, has been levying since before 1st April 1937 an octroi on foreign sugar but not on sugar manufactured in India.¹ The question for R.L.A.'s consideration is whether the levy of the octroi on foreign sugar is invalid on the ground that it amounts to discrimination in favour of sugar produced in India.²

2.¹ Under section 297(1)(b) of the Government of India Act, 1935 no Provincial Legislature or Government shall by virtue of anything in the Act have power to impose any tax, cess, toll or fee which, as between goods manufactured or produced discrimination in favour of the former.³ Under section 99 of the Bombay Local Boards Act, 1923, a district local board has power to impose any tax (except a certain toll) which the Provincial Legislature, that Legislature has no power by virtue of the provisions of section 297(1)(b) of the Government of India Act, 1935, to levy any octroi which is discriminatory in its effect; that being so, no such octroi can be levied by the District Local Board under section 99 of the Bombay Local Boards Act.⁴ It is true that under the last paragraph of section 99 of the Bombay Local Boards Act a District Local Board which was immediately before 1st April 1937 lawfully levying any tax under the section as then in force can continue to levy that tax notwithstanding that it is not a tax which the Provincial Legislature has under the Government of India Act, 1935 power to impose in the Province.⁵ The provisions contained in this paragraph are similar to those contained in section 143(2) of the Government of India Act, 1935.⁶

The powers given by these provisions are however subject to the restrictions imposed by section 297(1)(b) of the Government of India Act, 1935 and it would consequently not be competent for the Local Board to continue to levy any octroi which is discriminatory in effect. The view taken at "A" in the G.D. office note at page 56 ante is correct.

Sd/-

Secretary of Legal Affairs.

U.R. to G.D., no 1783, dated the 26th February 1942.

Id/-
10/2/

The opinion above is correct; R.L.A. may be interested to know that in the G of I. the language of adaptation (such as in the last para of S.99 L.B. Act) was held to be wider than that of S.No. 143(2) of the constitution act, and to cover taxes which appear in none of the lists (e.g. 'terminal tax' levied by Bombay Municipality) to that such taxes become lawfully levied by virtue of Sec.293 read with "or as may be otherwise directed by His Majesty" in Sec 12(1) of the constitution ^{a specific enactment} ~~Sec 297(1)(b), in sec 143~~ Act, No. adaptation, however wider, can override ^{must} bring the provisions of any law into accord with the constitution Act. I write this with reference to A on p.64, as I happened to come across the G of I noting (Reforms and Legislation Dpts.) in connection with terminal tax. S A S may also like to know

Sd/-

Under section 107(1) of the Government of India Act, if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void. In this case the Bombay Amendment Act and the Central Amendment Act contain provisions to the same effect. The Bombay Amendment Act does not thus contain any provisions repugnant to the provisions of the Central Amendment Act and that being so, no question of the Central Act prevailing over the Bombay Act arises. The Bombay Amendment Act is not small repealed or superseded in any way ~~by~~ by the Central Amendment Act. As the Bombay Amendment Act has been applied to and is already in force in the partially excluded areas it is not necessary to apply the Central Amendment Act to these areas.

Sd/-

19/2

Remembrances of Legal Affairs.

U.F. to H.D. No 1579 dated 20th February 1942.

14/- 19/2

Office of the R.L.A.

The facts of this case are similar to those reported in I.L.R. (1941) Mad. 358 (in re. Sannaga) and as held by the Madras High Court in that case the sanction of the Governor General under section 270(1) of the Government of India Act, 1935, would be necessary for prosecuting the postman for the offences under section 468 and 471, I.P.C. Such sanction would not it seems be necessary in respect of the offence under section 420, I.P.C. as it cannot strictly be said to have been committed by the postman in the execution of his duties. But the point is not quite free from doubt as the question whether any particular act is one purporting to be done by a public servant in the execution of his duty is substantially one of fact. (Hori Ram Singh V. The Crown (1930) Federal Court Reports 159; cf. also Emperor V Naik, 41 Bom L.R. 1227). Since in the present case sanction of the Governor General has to be obtained for prosecuting the postman, it would be safer to include section 420, I.P.C. along with sections 468 and 471, I.P.C. for the purpose of sanction.

• Section 400, I.P.C. to which reference is made in the District Magistrate's letter at p. 1 ante appears to be a clip as that section has been repealed by Act III 1925.

Sd/- 28/2
Representative of Legal Affairs

U.R. to P. & S.D., No 1657 dated the 28th February, 1942

D.O.No. 3573

Bhopal , C.I.

the 28th February, 1942

Dear Sir,

I should be grateful if you would very kindly let me know at your early convenience, the legal provision, if any, in the shape of fine or any other penal action, enforce submission by a candidate for a seat in the Legislative Assembly of the accounts of his election expense. Enlightenment in the matter is sought in view of the fact that Section 171(1) of the Indian Penal Code provides punishment with fine extending to Rs. 500/- in cases only of not keeping the accounts and does not appear to cover cases of non-submission of those accounts within specified period or such extended period as Government may allow. Does the law in force provide that such non-submission of accounts shall be presumed to amount to not keeping the accounts punishable under Section 171(1), Indian Penal Code.

Yours Truly,

Sd/-

Secretary,

Legislative Council.

The Secretary, to the Government of Bombay,
Legal Department

BOMBAY.

LE/3/4/

7

No. 26441

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 24th March 1942

From

P. N. Moos, Esquire, Barr-at Law, I.C.S.,
Remembrancer of Legal Affairs;

To

The Secretary,
Legislative Council,
Bhopal, C.P.

Sir,

With reference to your D.O. No. 3573, dated the 28th February 1942, I have the honour to inform you that under section 69(1)(f) of the Government of India Act, 1935, read with paragraph 5(1) of Part II of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936 and rule 53 of the Bombay Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936 and rule 54 of the Bombay Legislative Council Electoral (Elections and Election Petitions) Rules, 1936, the person who has failed to lodge a return of election expenses in the prescribed manner within thirty-five days from the date of publication of the result of his election would be disqualified for being chosen as, and for being member of the Provincial Legislative Assembly or Legislative Council and there is no penalty in the shape of a fine or any other penal action for failure to submit a return of election expenses. Under paragraph 4 of Part II of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, every election agent shall, for each election for which he is appointed election agent, keep separate and regular books of account and shall enter therein such particulars of expenditure in connection with the election as may be prescribed. If such election agent fails to keep accounts of expenses incurred at or in connection with the election he can be prosecuted with relevant sanction under section 196, Criminal Procedure Code, for the offence under section 171-I of the Indian Penal Code; but the mere failure to submit a return

of election expenses within the prescribed time would
not give rise to any factual or legal presumption of failure
to keep accounts of election expenses.

I have the honour to be,

Sir,

Your most obedient servant,

SE/-

23/3/

Remembrancer of Legal Affairs.

12/7/1

No. S-37
Office of the Governor's Secretary,
Government House,
Bombay, 23rd January 1942.

Subject: Position of members of personal staffs
of Governors

MEMORANDUM.

The position under the Government of India Act, 1935, of the Staff paid from sums provided under the Fourth Schedule to the Governor's Allowances and privileges Order, 1937, has recently been considered by the India Office. That Office has ruled that in view of the opening words of section 241 of the Act and the express provision in Section 48(B) read with clause 2 of the Third Schedule, Section 241 does not apply to such staff. By the Order in Council made under the Third Schedule the Governor is provided with an establishment by means of a the Governor's grant and he has an unfettered choice as to number, pay etc., of his Military Secretary and A.D.C. and their establishments subject to a limit as to cost. Under clause 7(2) of the Order in Council the Governor is to exercise his individual judgment in these matters. He can, therefore, appoint any one he likes, and can secure, to the posts of Military Secretary or A.D.C. subject to the limit as to cost.

2. The Auditor General is prepared to accept this as the statutorily correct position provided that where a Secretary of State's Officer or a military commissioned officer is appointed to one of the posts in question he should not be given without the Secretary of State's previous sanction terms more favourable or less favourable than those admissible to him under the rules ordinarily applicable to him. The Governor General accepts this view. Governor have, however, full discretion to grant compensatory allowance (other than t.a.) to such officers, subject to the observance of the general condition that the allowance is not on the

whole a source of profit to the recipient. The conditions of service of temporary Government servants or persons who have had no connection with Government service who on their appointment to such posts may be granted temporary commissions will, subject to any general or special orders of the Secretary of State applying to military officers holding such posts, be governed by the same rules and orders as apply to officers of the same category in His Majesty's forces.

3. In the case of pensioners re-employed on the personal staffs of Governors, who prior to their retirement were under after rule-making control of the Secretary of State, pension after employment will still be governed by the Secretary of State's rule (e.g. Articles 514, 519, 521 and 526 of the Civil Service Regulations or any relevant rule in the Army Regulations) while pay and other conditions of service will, subject to any limits of pay fixed by the Secretary of State for the posts, be determined by the Governor. The question whether authorities in India have any power to hold in abeyance the pensions awarded to Secretary of State's officers as required under one of the above mentioned rules is under separate consideration.

4. If on a person not in Government service or who, being in Government service holds no lien (active or suspended) on a post under Government, is appointed to a post on the personal staff of a Governor his pay will be fixed by the Governor subject to any limits fixed by the Secretary of State and his other conditions of service will, be such as the Governor may prescribe and should be defined at the time of his appointment. This is subject to the condition that in the case of ~~their retirement were not under the rule-making authority of the Secretary of State~~ re-employed pensioners appointed to such posts, who prior to their retirement were not under the rule-making authority of the Secretary of State, the Governor will have a special responsibility under section

under Section 52(1) (c) of the Act, so far as their pensionary rights are concerned.]

5. Similarly, the conditions of service of ministerial and other staff paid for from funds provided under the Fourth Schedule of the Governor's Allowances and Privileges Order should be defined by rules made under the authority of the Governor, and such rules will involve his special responsibility under Section 52(1)(c) of the Act.]

By order of the Governor of Bombay

Sd/-

Secretary to the Governor of Bombay.

To, The Finance Department.]

Office of the R.L.A.

Rule 70 in Appendix D to the Bombay Civil Services Classification & Recruitment Rules provides that on permanent appointment in the subordinate Medical Service a recruit will be required to execute a bond giving an undertaking to serve for a period of 10 years and in default to forfeit the sum of Rs. 1000 or such other sum as may be prescribed by Government. It appears that some of the recruits who on permanent appointment executed bonds have declined to serve for a period of ten years but have paid the penalty as prescribed in the bonds. There are also some recruits who have declined to execute bonds and have resigned their posts. The question for the consideration of the R.L.A. is whether these persons can be permanently disqualified from future employment in any civil department of Government.

The Bombay Civil Services Classification and Recruitment Rules made under clause (b) of sub-section (1) and clause (b) of sub-section (2) of section 241, and section 255 of the Government of India Act, 1935 regulate the classification and the methods of recruitment to the services and posts for which the Government of Bombay is competent to make rules. These rules prescribe the qualifications required for each service and post and circumstances involving a disqualification for appointment. There is however no provision in these rules debarring persons resigning their posts either before or after confirmation, from future employment in any civil department of Government. Under clause (viii) of rule 33 of the Bombay Civil Services, Conduct Discipline and Appeal Rules dismissal from the civil service of the

~~Crown involves a disqualification from future employment. An~~
~~officer who has paid the penalty prescribed under~~

Officer who has paid the penalty prescribed under a
bond executed under rule 70 in Appendix D to the Bombay
Civil Services Classification and Recruitment Rules and
resigns or an officer who resigns before executing such
a bond cannot be considered to be dismissed from service.
Consequently such officers cannot, under the rules as they
stand, be deemed to be permanently debarred from re-
employment in any civil department of Government.
However there can be no legal objection to the fact of such
resignation being taken into account in terminating
the candidate's relative suitability for selection for
appointment to any particular post. Absence of
disqualification does not necessarily imply any right
for selection to the appointment concerned.

Sd/-

14-4-

Remembrancer of Legal Affairs.

U.R. to H.D., no 162 conf1, dated the 14th April 1942.

Mr/10/4/

Office of the R.L.A.

.The question for R.L.A.'s consideration is whether by virtue of the provisions of section 255(2) of the Government of India Act, 1935 Government is precluded from asking the Public Service Commission to send a list of persons exceeding in number the vacancies in the subordinate civil judicial service which it wants to fill at any time.]

2.] Section 255(2) of the Government of India Act, 1935 provides that the Provincial Public Service Commission for each province, after holding such examination, if any, as the Governor may think necessary shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province. This section does not require that Government should appoint all the persons included in the list sent by the Commission but it only requires that appointments should be made from the persons included in such list. The section thus clearly contemplates that the list should include more persons than there are vacancies. The latter part of section 255(2) vests in the Governor the power of appointment and requires that it should be exercised in accordance with the regulations made by him as to the number of persons in the service who are to belong to different communities. In allocating appointments as between the communities, the Commission has no right to

be consulted (See section 266(4) of the Government of India Act, 1935). If the Commission were to insist that the Governor should first intimate to it the specific number of appointments to be made and their allocation as between the communities, and then to restrict its list only to the limited number of candidates required for filling vacancies, it would make the Commission virtually the appointing authority and clothe it with mandatory powers. This would render nugatory the power of the Governor to make the appointment, and would be contrary to the letter and the spirit of the constitution Act (See Sir Samuel Hoare's speech in Parliament quoted in Aiyangar's Government of India Act, at p. 279). The answer to the question is, therefore, in the negative.

Sd/-

11/4

Remembrancer of Legal Affairs.

M.R. to H.D. through Pr. S.D. No 3181, dated the 13th April 1942

Mr /10-4-

The question whether the lands vesting in the Central Government which are leased by it to third parties are liable or not to provincial taxation has been fully discussed in R.L.A's opinions No. 3530, dated the 22nd April, 1942 and 101-L, dated the 11th July 1941. As pointed out in these opinions, the question is not free from doubt and there is a conflict of view on the question between Mr. Kemp the ex-Advocate General and Mr. Setalwad, the present Advocate General in his opinion No. 22 of 1938 and provincial taxation on such lands would be clearly illegal. It is true that in paragraph 5 of the opinion, the Advocate General has remarked that it would only be fair to purchasers of land from the Central Government that it should be made clear to them that they would be liable to the payment of land revenue to the Government of Bombay. But the Advocate General has in this paragraph referred to 'purchasers' and not "lessees" of land and his remarks do not apply to cases where land are leased and not sold. Once it is held that the levy of the tax or assessment is illegal in the case of leased lands, the levy can ^{by no means} be held to be legal by reason of the insertion in the document of lease of a clause similar to clause 2(b) of the lease at page 11 ante. In the present case therefore, Government would be taking a risk in imposing assessment on the lands included in the lease.

Sd/-

16/4

Remembrancer of Legal Affairs.

U.R. to R.D., No. 33/18, dated the 17th April 1942

Office of the R.L.A.

Section 275 of the Government of India Act, 1935, provides: inter alia, that a ^{person} ~~person~~ shall not be disqualified by sex from being appointed to any civil service of, or any civil post under, the Crown in India other than such a service or post as may be specified by any general or special order made by the Governor of a Province in the case of services and posts in connection with the affairs of the Province.¹ The disqualification referred to in the section² clearly means legal incapacity.³ Therefore, the effect of the section is that ~~there is~~ in the absence of an order made under it, no person is by sex incapacitated in law for being appointed.⁴ But the section while rendering every person eligible for appointment irrespective of sex, does not lay down any positive rules of practice.⁵

Appointments remain at the discretion of Government.⁶ Government can therefore give preference to men, or indicate its preference in in the interests of administrative efficiency.⁷ To do so would doubtless place women at a disadvantage⁸ but it would not place them under a legal disability as it would still be open to Government to appoint a few women even though the majority of appointments are filled by men.⁹ Consequently the view ~~was~~ taken at 'A' in the Political and Services Department note is correct and the practice mentioned at 'C' of that note is in order.¹⁰

odp-

25/4/

Remembrancer of Legal Affairs.

Office of the R.L.A.

The Remembrancer of Legal Affairs has not been requested to consider that charges can be made out against Ghangarekar, Branch Post Master. The question raised for consideration is whether the sanction of the Government of India is necessary for prosecuting Ghangarekar for offences under section 409 and 467 of the Indian Penal Code.

2 It was pointed out by the Remembrancer of Legal Affairs in his opinion No. 5746, dated 30th June 1941 that the Federation having not yet been established the consent of the Governor General would be necessary under section 270(1) of the Government of India Act for the prosecution of a person employed in connection with the affairs of Government of India for anything which is done and purports to be done to have been done by him in the execution of his duty as a servant of the Crown. It was also pointed out by the Remembrancer of Legal Affairs in the same opinion that when a public servant embezzles some property entrusted to him and thereby commits a criminal breach of trust under section 409 of the Indian Penal Code he is not doing an act nor even purports to do an act in execution of his duty and a case like that would not ordinarily fall within the scope of section 270(1) of the Government of India Act. But Ghangarekar seems also to have forged false entries in the daily account receipt with a view to prevent the detection of the misappropriation. He did this while acting or purporting to act in execution of his duty. Sanction of Governor General would therefore be necessary to prosecute Ghangarekar for the offence under section 467 of the Indian Penal Code.

Remembrancer of Legal Affairs

H.R. to H.D. , No. 4918 , dated the 16th June 1942.

Kr/10/4

Section 255(1) of the Government of India Act provides that the Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualification to be attained by persons desirous of entering the Subordinate Civil Judicial Service of a Province. The standard of qualifications referred to in this section would include the age limits to be prescribed for the candidates to the service. Any rules, therefore, prescribing the age limits or the ~~max~~ relaxation of the age limits so prescribed for recruitment of such candidates have to be made after complying with the procedure laid down in this section, that is to say, after consultation with the Provincial Public Service Commission and with the High Court. It appears from the letter of the Public Service Commission at pages 1-3 ante, that only rule 36 of the Bombay Civil Services Classification and Recruitment rules has been made in accordance with the provisions of this section and that the Provincial Public Service Commission and the High Court were not consulted contained in Note 1 to 7 relating to the relaxation of age limits. If this is so, these other provisions cannot be said to have been made under section 255 also of the Act. The fact that the preamble to the rules mentions section 255 as one of the sections is no good ground for holding that these other provisions were made under that section. In order that these provisions may apply to candidates to the Subordinate Civil Judicial Service, it will be necessary to make rules in terms of these provisions under section 255, after complying with the requirements of this section. It is desirable to have a Self-contained set of rules made under this section. The view

taken in the P.& S.D. office note at p.p/ 11-12 ante is not correct.

33/-

26/6

Remembrancer of Legal Affairs.

U.R. to P.&S.D. No 5243, dated the 26th June 1942.

Mr/10/4/

The principal question for consideration is whether it is open to Government to relax in cases of individual candidates the requirements laid down in the Recruitment Rules.

2. The Recruitment Rules were originally made in exercise of the powers delegated to the Local Government under the Civil Services (Classification, Control and Appeal) Rules made under section 26-B(2) of the Government of India Act, 1919. The rules contemplated by that section could provide for "the classification of civil services, the methods of recruitment, their conditions of service, pay and allowances, discipline and conduct." These rules were replaced by the present Recruitment Rules in 1933, supposedly made, as stated in the preamble, in exercise of powers conferred by clause (b) of sub-section (1) and clause (b) of sub-section (2) of section 241 and section 255 of the Constitution Act. Now clause (a) of sub-section (1) of section 241 only provides that appointments to services and posts of a Province shall be made by the Governor of the Province or by such person as he may direct. The clause does not contemplate making of recruitment rules; the only rule or order it contemplates is for the purpose of directing any person to make the appointments. Clause (b) of sub-section (2) of section 241 requires the Governor to make rules as regards the conditions of service of persons serving in connection with the affairs of a Province. The phrase 'conditions of service' referred to in sub-section (2) has to be interpreted in a narrow sense in this connection as laid down in *Suraj Narain vs. N.W.F.P.* IV F.L.J.No.12 (page 22, at page 28). It evidently does not include tenure of service or dismissal from service. It

likewise include admission or recruitment to any service. The section itself distinguishes between recruitment, which is dealt with in sub-section (1), and conditions of service, which are dealt with in sub-section (2) et seq. This is emphasised by the use, in ~~sub-section~~ sub-section (2) of the expression "conditions of service of person serving His Majesty," which shows that the rules to be made are to apply to persons after they enter service (Cf. para. 8 of R.L. A.'s opinion No 6185 dated 8th July 1940). That this sub-section does not authorise or require framing of recruitment rules is evident also from the circumstance that when Parliament authorised such rules, it said so in express terms (section 96-B of the Government of India Act, 1919; section 255(1) of the Constitution Act; Harrell on Interpretation of Statutes, Ed. 8, p. 278-79). It is only under section 255(1) that rules can be made "defining the standard of qualifications to subordinate civil judicial service of a Province". Consequently to the extent that they fall under section 255(1) above said, the Recruitment Rules are statutory but not otherwise.

3. Government as the appointing authority, has the power to lay down the rules regarding qualifications of candidates for posts in the civil services, for the guidance of subordinate authorities and for the information of the intending candidates. Sub-section (3) of section 266 provides inter alia that subject to the regulation framed thereunder and to the provisions of sub-section (4) the Public Service Commission shall be consulted on all matters relating to methods of recruitment, and on the principles to be followed in making appointments to civil services and posts. If the Recruitment Rules were framed in consultation with the Public Service Commission, as seems to be the case, they can be regarded as embodying the decisions of Government on matters specified in clauses (a) and (b) of the said sub-section (3).

4. Consequently before making a deviation from the Recruitment Rules by way of relaxing them in any particular case or class of cases, Government must follow the procedure of consulting the Public Service Commission as required by section 255(1) where that sect. ca. applies, or as required by section 266(3) in all other cases. But it is open to Government to avoid so consulting the Commission under section 266(3) by making a regulation under ~~section 266(2)~~ ~~section 266(2)~~ under that section generally or specially for that purpose.

Sd/-

24/7

Remembrancer of Legal Affairs.

U.R. to P.S.D. No. 4186 dated 21st May 1942.

HE/10/4

R.L.A.'s opinion No 8026, dated 13th September 1941, concerns "conditions of services" rules, but not "recruitment" rules. See R.L.A.'s opinion No. 4186, dated 21st May 1942. The questions now referred for the consideration of The R.L.A. are:-

(1) Whether qualifications for a post come within the terms of section 266(2) and (3) of the Government of India Act, 1935; and

(2) Whether the Public Service Commission must be consulted before qualifications are prescribed either by rule or in a requisition.

2. Section 266(2) of the Government of India Act, 1935, lays it down as the duty of the Federal Public Service Commission if requested by any two or more Provinces to assist them in framing and operating schemes of joint recruitment for their forest or other services for which candidates possessing special qualifications are required. The scheme contemplated by this sub-section is evidently a comprehensive scheme, and includes the laying down of qualifications for appointment to any post or service included therein.

3. Section 266(3) provides that the Provincial Public Service Commission shall be consulted (a) on all matters relating to the methods of recruitment to civil service and for civil posts and (b) on the principles to be followed in making appointments to civil services and posts. "The method of recruitment" and "principles to be followed in making appointments" include all matters that determine recruitment and therefore include the

prescription of qualifications for appointment to any service or post (see paragraph 3 of R.L.A.'s opinion No. 4186, dated 21st May 1942.) The Commission must therefore be consulted before qualifications are prescribed whether by rule or in a requisition or in any other form whatsoever. But it is open to Government to avoid so consulting the Commission under sub-section (3) of section 266 by making a regulation under that sub-section generally or specially for that purpose as permitted by that sub-section.

Sd/-

Secretary of Legal Affairs.

U.R. to P.&S.D., No 4539, dated the 2nd June 1942.

LT/10/4/

The note of D.S. (L.D.) which incidentally was not seen by R.L.A. was based on an incorrect assumption. It was through oversight sent to R.D. without verification. The error is regretted.

2. Section 124(2) of the Government of India Act, 1935 provides, inter alia, that an Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties upon officers of a Province. Under section 316 of the Act, references in the provisions of the Act to the Federal Legislature and Federal laws shall be construed as reference to the Indian Legislature and laws of the Indian Legislature. The Indian Income Tax Act, 1922 is an Act of the Indian Legislature. In view of the provisions of section 316 of the Government of India Act, it will be an Act of the Federal Legislature within the meaning of section 124(2) of the Act. Section 46(2) of the Indian Income Tax Act imposes certain duties on the Collector in a Province. The expenses of the litigation in this case were incurred in connection with the performance of these duties. Section 124(4) of the Act provides that where by virtue of this section powers and duties have been conferred or imposed upon officers of a Province there shall be paid by the Federation to the Province such sum as may be agreed----- in respect of any extra costs of administration incurred by the Province in connection with the exercise of those powers and duties. The expression "by virtue of this section" includes "by virtue of subsection (2) of section 124". It follows, therefore, that the Province of Bombay is entitled to recover from the Government of India the extra costs of

administration, namely the expenses of the litigation in question.

3 Neither section 124(1) nor section 133 of the Government of India Act has any application to the case under consideration. The former relates to functions of the Central Government entrusted to the Province by the Governor General. The Collector was not acting here in the exercise of any such functions. There is nothing in section 133 to hold that the amount of income-tax assigned to a Province under this section includes extra costs incurred by a Province in connection with the discharge of the duties imposed on its officers under the Indian Income Tax Act.

Sd/-

30/6

Secretary of Legal Affairs

O.R. to R.D., 5360, dated the 1st July 1932.

Mr/10/4/

H.T. No. 5867
7-7-62

Submitted.

The question for R.L.A.'s consideration is whether an honorary appointment comes within the purview of sec 265(3)(c) of the Govt. of India Act, 1935.

Sec. 265 (3)(c) of the Govt of India Act 1935 provides that on ceasing to hold office no other member of the Federal or of any Provincial Commission shall be eligible for any other appointment under the Crown in India without the approval, in the case of an appointment in connection with the affairs of a Province, of the Governor of the Province in his discretion and, in the case of any other appointment, of the Governor General in his discretion. An honorary appointment would be no less an appointment under the Crown in India and would come within the purview of the above section. This view is supported by the fact that where Parliament has intended to exclude honorary appointments it has used the expression "Office of profit under the Crown in India".

See sec. 68(a)

Td/-

Paras. 2 ^{and} 3 of Joint Secretary, G.D.'s dated the 10th

August 1942: A question similar to the one raised by joint Secretary G.D.¹, in para 2 of this note has been considered in R.L.A's opinion No 6726, dated 31st August 1938, with which the Advocate General has agreed. According to that opinion in both the Cantonments Act and the Municipal Acts have been applied to any area, it can be held that the Cantonments Act as a special Act would supersede the Municipal Act which is in the nature of a general Act. In this opinion there would be no conflict of jurisdiction between the Municipalities and the cantonment Boards. Both the R.L.A.² and the Advocate General have however observed that the legal aspect of the matter is not free from doubt. From the letter of the Government of India, dated 6th June 1942, at page 1 onto it would, however appear that they take a somewhat different view on the matter. They seem to think that there would be conflict in the matter of local self-government in those areas and therefore proposes to resolve that conflict by the amendment of the Cantonments Act, which they can no doubt do in virtue of the provisions of Section 100(1) of the Government of India Act, 1935, read with entry 2 in the Federal Legislative List. By the proposed amendment they do not want to oust entirely the jurisdiction of the local authority created by the Provincial Acts from the area declared to be a cantonment but to define the limits of that authority and the cantonment Board with the limits of that authority and the Cantonment Board with respect to that area. To that end they propose to insert in the Cantonments Act the following provision:

"The provisions of local laws relating to local self-government and the jurisdiction of local authorities constituted thereunder shall not have effect in any place

declared to be cantonment under sub-section (1) of section 3, save to such extent and subject to such modifications as the Central Government may by notification in the Official Gazette direct"

It will be seen from the above provision that the Municipalities will have jurisdiction over the municipal areas declared as cantonments to some extent and the Provincial Acts which applied to those areas would continue to apply to them with certain modifications. The modifications will be made by the Central Government.

2. As regards the Bombay Local Boards Act, 1923 and the Bombay Village Sanitation Act, 1936, they contain provisions (see Section 4(3) of the Local Boards Act and section 4(e) of the Village Sanitation Act) which, as observed by the Government of India, go some way in resolving the possible conflict. In view of those provisions however the Local Boards and the Sanitary Committees will automatically cease to have jurisdiction over ~~the areas~~ the areas which may hereafter be declared to be cantonments. If the Government of India desires that these Acts should apply to cantonments with any modifications it would be necessary to make suitable amendments in those provisions so that there should be no difficulty in applying those Acts with the necessary modifications made therein by the Central Government to those areas. It would no doubt be open to the Provincial Legislature to amend those provisions, but as it appears from the Government of India's letter that the Central Government will deal with these Acts for the purpose, it does not appear that any appear that any Provincial Legislation is called for in this matter. The two Acts may be brought to the notice of the Government of India.

Sd/-

19/10
Secretary of Legal Affairs.

U.P. to G.I. No. 6270 dated 19/10/38

Office of the

The proposal in these papers is to make a rule under section 255 of the Government of India Act, 1935 repeating the provisions of rule 36 in Appendix C to the Bombay Civil Services Classification and Recruitment Rules and providing that rules 1 to 12 of the said rules shall apply to the case of Subordinate Judges in as far as they are relevant. There is no objection to making a rule as proposed, but it is not necessary to repeat therein the provisions of rule 36. As pointed out in R.L.A.'s opinion No 5243, dated the 26th June 1942 rule 36 has been made in accordance with the provisions of section 255. It is a statutory rule and there is no reason why it should be again repeated in the proposed rule. It would be sufficient if the proposed rule only refers to the relevant rules of the Bombay Civil Services Classification and Recruitment Rules and provides that in as far as may be they shall apply to persons desirous of entering the Subordinate Civil Judicial Service of the Province. It is suggested that it would not be necessary to refer at all in the proposed rule to rules 1 and 2 and rules 9 and 10. Rule 1 gives title to the Rules and prescribes the date with effect from which they shall come into force, while Rule 2 mentions the services to which they shall apply and to which they shall not apply and as such it is not necessary to make any reference to them in the proposed rule. Rule 9 provides that officers appointed to Class I of the Indian Public Health Service shall be required to enter into agreements. Rule 10 prescribes how recruitment shall be made to Subordinate Services. These rules can have no application to the case of Subordinate Judges and a reference to these rules also may be omitted from the proposed rule under section

255.

Sc/-

5/40

U.R. to the P. & S. No. 437 conf. dated the 22nd October
1942

IR/10-4

Office of the R.L.A.

The question for R.L.A.'s consideration is whether the following employees can be considered to be Government Servants, namely:-

1. The paid personnel recruited for the Bombay Fire Watchin Scheme:

2. The personnel serving under the City Engineer in connection with the Scheme for Structural A.R. [P.] and (3) members of the Auxiliary Fire Service.

2. Attention is invited to R.L.A.'s opinion Nos 29 dated 3rd January 1939 and 2882 dated 2nd April, 1942 in which the question whether any officer can be said to be the servant of the Crown has been considered. According to the view taken by the High Court in the case of "Moratha vs. Pandurang" (1938 I.L.R. Bom. 770) which has been referred to in the latter opinion the expression "servant of the Crown" has the same meaning which is given in the definition of the expression "servant of the Queen" in section 13, 14 and 17 of the Indian Penal Code as including all officers and servants continued, appointed or employed in India by or under the authority of the Government of India or any Government. ^(As stated)

that opinion the main point for consideration in deciding whether a person is a Government or not would be whether he is appointed or employed or continued by or under the authority of the Government.

3. As regards the first class of employees it appears from G.R., H.D. No 495-E dated 16th July 1942 that Government has constituted a body called the Joint Civil Defence Committee for the City of Bombay and entrusted it with various activities. One of the activities is the recruitment and training of fire-watching parties. It is not clear from the G.R. or the draft scheme at Slip A whether the appointment of persons to form firewatching parties will be made by or under the authority of the Government or the Joint Civil Defence.

Defence Committee. Presumably the appointments will be made by or under the authority of Government and the expenses of the paid personnel will be met from Government funds. If so the person so appointed can be regarded as servant of the Crown.

4 As regards the second class of employee, namely those serving under the City Engineer, they fall into two sub-classes, namely, (i) the staff lent by the Municipality and ~~classes~~ (ii) the additional staff which the City Engineer is authorised to engage under G.R., H.D. No. SD./A.R.P. 3150 dated 18th March, 1942. The additional staff will be appointed by the City Engineer under the authority of Government (see paragraph 2 of the G.R.) consequently sub-class (ii) can be regarded as Government servants. As regards sub-class (i) they cannot be considered to be officers or servants of the Government unless the City Engineer makes their appointments or takes them over and continues them under the authority of Government. (See R.L.'s opinion 2982 dated 21st May 1934).

5 The case of the members of the Auxiliary Fire Service stands on a different footing. Under rule 3 of the Bombay Air Raid Precautions Services which is constituted by Government under the Air Raid Precautions Services Ordinance, 1941. As pointed out in R.L.A's opinion Nos. 148-L dated 24th July 1941 and 138-conf. dated 2nd April 1942 the members of the A.R.P Service are Crown servants. The personnel recruited for the Auxiliary Fire Service would therefore be Crown Servants.

6 In order to make Government servants of any class subject to the administrative control of the Municipal Commissioner, it is legally feasible to make special rules for the purpose governing the conditions of their service provided the rules are within the scope of sections 240 and 241 of the Government of India Act, 1935 (and of section 10(1)(b) of the Air Raid Precautions Services Ordinance, 1942).

5
1941 where the Ordinance applies).

Sa⁷₂

Remembrancer of Legal Affairs.

U.R. to H.D (Spl.) A.R.P., No. 7907, dated the 2nd
October 1942.

Office of the R.L.A.

The question for the consideration of the R.L.A. is whether inferior village-servants useful to Government are servants of the Crown within the meaning of section 8(j) of the Bombay Village Panchayat Act, 1933.

2 Section 8(j) of the Bombay Village Panchayat Act, 1933 provides that no person may be a member of a Panchayat or continue as such, who is a servant of the Crown or a servant of any local authority. The expression "servant of the Crown" is not defined in the Act, but seems to have been used with reference to section 241 of the Government of India Act, 1935 which relates to Crown Servants i.e. persons serving His Majesty in the affairs of the Federation of the Province. Even in the Government of India Act, 1935, the expression "Crown servant" or "person serving His Majesty" has not been defined. In his opinion No 29, dated 3rd January 1939 the R.L.A. opined: "In the absence of any authoritative definition expression "Crown servant" or "person serving His Majesty" the test followed by the Parliament in making adaptations to Indian Acts is that no officer can be said to be the servant of the Crown unless he is either appointed by Government or paid out of Government revenues". In *Marathe v. Pandurang* (1938 I.L.R. Bom. 770) a question arose whether a servant in the Bombay Subordinate Medical Service was a "servant of the Crown" within the meaning of section 270 of the Government of India Act and the Bombay High Court held: "Though there is no definition of the expression "servant of Crown" in the Government of India Act, 1935, the expression as occurring in section 270 of the Act, has, unless there is something in the provisions of the Act which suggests a different meaning, the same meaning, which is given in the definition of the expression "Servant of the Queen" in a-

13, 14 and 17 of the Indian Penal Code as including all officers and servants continued, appointed or employed in India by or under the authority of the Government of India or any Government". The expression "a person serving His Majesty" used in section 7141 seems to be synonymous with "servant of the Crown" used in section in section 270. Consequently the main point for consideration ~~is~~ is whether the inferior village servants useful to Government are appointed or employed by the Government of Bombay

3. The provisions contained in Part X of the Bombay Hereditary Offices Act, 1874, relate to the inferior village hereditary offices. Sub-section (4) of section 64 in Part X provides for powers of the Mamlatdar and the Mahalkari to pass orders in regard to the appointment, remuneration period of service, suspension and fining of persons officiating the grant of leave of absence and other matters of discipline not expressly provided for by this or any other law for the time being in force. Under section 7 of the Bombay Village Police Act the Police Patil has authority over all village servants and under section 9 they shall be liable to penalties for neglect of duty. By Government Notification (Finance Department) No 1527/33-B, dated the 1st April 1937 the power to appoint Government servants which had vested in authorities other than the Provincial Government before 1st April, 1937 has been continued. Consequently the powers to appoint inferior village servants vested in the Mamlatdar and Mahalkari under section 64(4) of the Hereditary Offices Act, 1874, before the Government of India Act, 1935 have, by virtue of the aforesaid Government notification, continued. That being so, it appears that the inferior village servants being appointed under the authority of Government are apart from the question whether or not they are, paid out of Government revenues, although usually through the cash payments if any, would also be made out of the provincial

recories, servants of the Crown within the meaning of section 8(j) of the Bombay Village Panchayat Act (cf para 2 of R.L.A's opinion No. 3128 dated 6th April, 1938). In the present case Pardharinath Krishna Hanabar is an inferior village servant useful to Government and is paid Rs.2 as Mushahira out of Government revenues.

Consequently it appears that he is a servant of the Crown within the meaning of section 8(j) of the Bombay Village Panchayat Act. But the point is not quite free from doubt.

4 In the course of the second reading of the Bombay Village Panchayat Amendment Bill XVI of 1938 by which clause (j) was inserted in section 8 of the Bombay village Panchayat Act the Hon. Minister in charge stated: The legal position in this respect has been examined and only the Police Patil and other servants will be excluded from contesting elections. Inferior village servants such as balutedars and others are not included in the term "Crown servants". (see para 617 of the Bombay Assembly Debates, Vol. V. Pt. I., 1939). No opinion of the R.L.A. on the point is traceable. It has been held by the R.L.A. in his opinion No. 3128, dated the 6th April 1938 that a revenue P Patil is a servant of the Crown in the same way as a Police Patil. The statement made by Hon. Minister does not appear to be quite correct in so far as it is construable with reference to inferior village servants doing duties for Government as distinguished from pure balutedars who may or may not work for the villagers from whom they receive their balutas. Since however Government had given expression to a definite opinion in the Assembly in the course of the debate on the Bill, it does not appear desirable that it should now resile from that opinion and hold that inferior vil-

servants are servants of the crown under section 8(j) more especially as it was on account of the view expressed in the Assembly that the amendment to delete the particular clause was withdrawn.

It should therefore be left to the party contesting the election of such inferior village servant to test the validity thereof in a Court of law and until there is an authoritative decision on the point Government may continue to hold that inferior village servants are not servants of the Crown. In the alternative, in order to dispell all doubts the point the Bombay Village Panchayats Act may be suitably amended so as to permit inferior village servants to be members of the Panchayat. This however is a matter of policy to be decided by the administrative Department.

Ed. P.M. Hens,

Remembrancer of Legal Affairs.

U.R. to G.D., No 2832, dated the 2nd April 1942

Sub-section (3) of section 119 of the Government of India Act, 1935 provides inter alia that all regulations made under the provisions of any Provincial law which prescribe the professional technical qualifications which are to be requisite for any purpose in British India or impose, by reference to any professional or technical qualification, any disability, liability, restriction or condition in regard to the practicing of any profession or carrying on of any occupation, trade or business or the holding of any office in British India shall, not less than four months before they are expressed to come into operation, be published and if within two months from the date of the publication complaint is made to the Governor that the regulations will operate unfairly as against any class of persons affected thereby the Governor may in the exercise of his individual judgment disallow the regulations. In this sub-section the expression "regulations" includes by-laws. To attract the operation of the first instance prescribe the professional or technical qualifications which are to be requisite for any purpose in British India. The proposed amendment of by-law 38 of the Bombay Nurses, Midwives and Health Visitors Registration By-law, 1935, debars nurses, midwives and health visitors of such of these Provinces as have imposed special restrictions on the nurses, midwives and health visitors of this Province from registering therein. The amendment is referable to the Province to sections 12 and 23 (1)(5) of the Bombay Nurses, Midwives and Health Visitors Registration Act 1935, and as such it does in

effect prescribe an additional territorial qualification which is requisite for the registration in this Province of nurses, midwives and health visitors belonging to the Dominions. But the Qualification introduced by the amendment is based entirely on political considerations and is plainly not a professional or technical qualification, for it in no way addresses itself to the merit or quality of any technical or professional qualifications. In other words the proposed amendment does not prescribe any professional or technical qualification which a nurse, midwife or a health visitor must possess before he or she can be registered in this Province. As sub-section (3) of section 119 refers in terms to "Professional or technical qualifications" and not to "Qualifications" in general, the phrase "Professional or technical" must be given its full significance in interpreting the sub-section. It does not therefore appear that the proposed amendment would attract the provisions of sections 119(3).

Sd/-
11/9

Remembrancer of Legal Affairs.

U.R. to the M.D., No. 7330 dated the 12th September 1942.

The question for R.L.A's consideration is
Whether the Civil Services (Conditions of Service)
Ordinance, 1942 applies to the members of the Public
Service Commission and the Staff of the commission.

2. The Civil Services (Conditions of Service
Ordinance, 1942 is made under section 72 of the Ninth
Schedule to the Government of India Act, 1935. Under
that section any ordinance made thereunder has the
like force of law as an Act passed by the Indian Legisla-
ture. The Ordinance which in virtue of the above
provision has no greater force than an Act passed by
the Indian Legislature has given power to the appropriate
Government to require any Government servant to serve in
any place in India notwithstanding anything to the
contrary in any rules regulating his conditions of
services. In effect the Ordinance Prescribes in the case
of a Government servant a condition of service which
would override any rules made under section 241, such
an Act would by virtue of the provisions of section 110
read with sub-section (4) of section 241 of the Government
of India Act, 1935 be competent, as respects person
serving His Majesty in a civil capacity in India, whose
conditions of service under Section 241. The
conditions of service of the members of the Public
Service Commission and their staff are, however, Prescrib-
ed not under section 241 but under section 265 of the
Government of India Act. There is no provision in the
Act, similar to, section 241 (4) by virtue of which it
would be possible to make an Act regulating the condi-
tions of service of the members of the Public Service
Commission and staff of the Commission which can have the

the effect of overriding the regulations made under section 265. In the absence of such a provision and in the face of the clear bar against the making of such an Act contained in sub-clause (ii) of clause (b) of section 110 of the Government of India Act, 1935, it must be held that the Civil Services (Conditions of Service) Ordinance does not apply to the members of the Public Service Commission and the staff of the Commission. The answer to the question is therefore, in the negative.

Sd/-

17-0-

Remembrancer of Legal Affairs.

U.R. to P. & S. No. 7526 dated the 18th September 1942.

The question for R.L.A.'s consideration is whether the Governor in his discretion can make a regulation under section 265(2) (b) of the Govt. of India Act, 1935 on the lines of section 2 of the Civil Services (Condition of Service) Ordinance, 1942.

2. Under clause (b) of sub-section (2) of section 265 of the Govt. of India Act 1935, the Governor in his discretion has power to make regulations prescribing the number of staff of the Public Service Commission and the conditions of service. A regulation prescribing that a member on the staff of the Commission shall be liable to serve in any place in India either the Provincial Govt. itself or the Crown Representative or any other Govt. in Br India will be a regulation prescribing a condition of service and would as such be covered by the provisions of clause (b) of sub-section (2) of section 265. It would be therefore competent for H.E. the Governor to make the proposed regulation. The prescription made in A(2)'s note dated 23.9.42 at p. 4 ante is correct.

Id/ 13-10

D.S.

R.L.A.

Id/ 17/10

U.R. to P. & S.D. No. 8489 dated 20th October 1942

Submitted

Attention is invited to the note from the Raja of Bhosle accompanying the D.O. letter from the Resident for Kolhapur and the Deccan States d/16-9-41. The Raja Darbar requested for permission to use the water from the Nira River and Bhutgar Storage for irrigation. The Darbar proposed to cultivate about 3,000 acres of land for sugarcane. During the rains and winter the Darbar intended to use the water for the crops from the natural flow of the Nira, Velvandi and Ganjwant Rivers and during the hot season it wished to appropriate water from the Bhutgar Dam. After taking into consideration the observations and remarks of the Superintending Engineer, D.I.C. and the Commr. G.D., H.E. the Governor informs the Raja of Bhosle that there was no margin available for any fresh commitment.

2. The Resident for Kolhapur and Deccan States then addressed another D.O. letter to the Secy., P.W.D. on 22-5-42, stating that the Nira River bed from the Bhutgar Dam down stream as far as village of Sargole, had not been cut and cleared by the Raja Darbar to the Govt. of Bombay and consequently the irrigation authorities would appear to be using all these years a channel for leading off the water of the Bhutgar Dam which for a certain length has never been acquired and which is the absolute property of the Raja Darbar. In light of the observations made by the Super-Engineer, D.I.C., the argument advanced by the Resident for Kolhapur was examined by the E.L.A. from all the aspects (vide E.L.A.'s opinion No. 4360 d/-12-6-42) and the decision

of Govt.' was communicated to the Resident on the lines of the R.L.A.'s opinion.

P.D. 87-88

-10-

3. Attention is invited to the observations of the Rhor State on the view expressed by the Secy. P.W.D. in his D.O. letter dated 19-6-42.

It will be noticed that the Rhor Darbar is not prepared to accept the view point of the Govt. of Bombay and states that as it is confident about its right to use the water, it would instal pumping apparatus in the neighbourhood of the village of Shirval to withdraw that water unless the Bom. Govt. agreed to refer the matter to arbitration. The Resident requests Govt. to state whether Bom. Govt. is prepared to refer the matter to arbitration.

Vide p. 101 ante.

4. The P.W.D. office intends to inform the Rhor Darbar that there is no provision in the Govt. of India Act, 1935 for referring such matter to arbitration and that if the Darbar intends to establish its claim over the water as contended by it, their remedy lies in making a complaint in the matter to the Governor General under sect. 130 of the Govt. of India Act, 1935. The R.L.A. is requested to advise if the view expressed by the P.W.D. is correct.

5. Under section 130 of the Govt. of India Act 1935 if it appears to any Governor's Province or to the Ruler of any Federated State that the interest of that Province or State or, of any of the inhabitants thereof, in the water from any natural source of supply in any Governor's or Chief Commr's

Province of Federated State, have been or are
ly to be affected prejudicially by

(a) any executive action or
legislation taken or
passed or proposed to be
taken or passed, or

(b) ~~the~~ ~~Government of~~ ~~Ruler~~ ~~may~~
complain to the Governor-
General

The question is whether the Bhur State
is a Federated State and if so whether
the provisions of section 130 of the Act
would be applicable? Sect. 6(8) of the
Government of India Act, 1935, provided that
in this Act a State which has acceded to
the Federation is referred to as a "Federated
State". It is a question of fact whether
the Bhur State has acceded to the Federation.
Sect. 311(3) however, provides that no Indian
State shall for the purpose of any reference
in this Act to Federated States be deemed to
have become a Federated State until the
establishment of a Federation. As no
proclamation for establishment of Federation
of India has been issued under sect. 5, no
Indian State can be deemed to have become a
Federated State and consequently in the
present case the Bhur State cannot resort to
the provisions of section 130 of the Govern-
ment of India Act, 1935. The Resident
inquires whether the Don. Govt. is prepared
to refer the matter to arbitration. The
Federation being not yet established section

130 of the Govt of India Act 1935 will have

no application. As the Bihar State adopts an adamant ~~x~~
attitude and proposes to install pumping
apparatus the only course left open
to Govt is to agree to refer the dispute to
arbitration.

Id: 6/10

S.A.S. I agree reply may be as A-A of
Mr. Bhargava's note as
slightly amended.

67
A.H.T

Is Sect 311 to be interpreted

as meaning that the sections where
"Federated State" occurs are to be
held in abeyance until there is a
Federation? That is what the result
of the above interpretation would be?

Would there then be no law governing
the Administrative relations between
the Crown the provinces and the States?
Is there no transitional provision in
the Govt of India Act until Federation
is established?

Would it not be possible, ~~upon~~
from Sect 130 to lay the matter before
the Governor General and ask him to
settle it or appoint a commission? To
submit to arbitration without a reference
to the Governor General would probably
mean that the State obtained half of
its demands and I am inclined to think
that this is a case where the State is
entitled to very little if any.

Would office please consider?

S3/.

2/10

Office of the R.L.A.

65-

The federation being not yet established section 130 of the Government of India Act, 1935 will have have no application. The procedure to follow in this case would be that indicated in paragraph 308 of the Montague Chelmsford Report and accepted by the Government of India by its Foreign and Political Department Resolution No. 427-R, dated 23rd October 1920 (see Report of the Indian States Committed p.p. 37-38)

2. As the Ihor State adopts an adamant attitude and proposes to install pumping apparatus the only course open to Government would be to agree to refer the dispute to arbitration.

Sd/-

15/10

Remembrancer of Legal Affairs.

U.R. to the P.W.D. , No. 8373 dated the 16th October 1942

Lr. 11/10

No. 10820, dated 16-10-42.
Submitted with reference to D.S.H.D. 4s

note dated 13th inst. at p.2 ante

2. In the case of Suraj Harain Anand Versais North-West Frontier Province, reported in (19410) I.L.R., Karachi (F.C.) page 165, the Federal Court has ruled that the provisions of section 2 of the Govt. of India Act, 1935, do not override the provisions of section 240(2). Sections 240(2) lays down that no Crown servant shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. In view of the interpretation put by the Federal Court upon Section 240(2) and 243 the Govt. of Sind considers that Sec. 29(3) of the Bombay District Police Act, 1890, conflicts with the provisions of sec. 240(2) of the Constitution Act. To remove the conflict the Govt. of Sind is of the opinion that sec 29(3) of the District Police Act should be amended suitably. Before proceeding further the Govt. of Bombay is requested to state whether the question has been considered by the Govt. of Bombay and if so, to state what action has been taken in the matter. The H.D. has requested the R.L.A. to see the papers first as the question raised is primarily legal-

3. Under sec. 9 of the District Police Act, as it stood before the Act was amended by the Adaptation of Indian Laws-Order in Council the District Superintendent of Police had power to appoint police officers of the grades of head-constable and constable. Similarly section 22A empowered the Dist. Superintendent to appoint certain additional police officers. But as

these powers were inconsistent with sec 241(1) of ~~the Constitution~~
the Constitution Act, the relevant provisions have been
suitably adapted. (please see paras 3 & 13 of R.L.A's
opinion No. 59-p dated 3rd July 1937).

In section 29(3) the powers of the Inspector
General of Police, District Superintendent of Police
etc., of dismissals have been retained. In Para
3 of R.L.A's opinion No. 59-p dated 3rd July
1937 it is stated that none of the adaptations
made in the Dist. Police Act are consequential
upon the provisions of sec 240(2). But in view of
the Federal Court ruling it seems necessary to amend
Sec. 29 suitably.

4. It, therefore, appears that the question was
not specifically raised at the time of adaptation of
the Bombay Dist. Police Act, 1890. The Govt of
Bombay may, however, agree with the Govt. of
Sind that in view of the authoritative ruling of
the Federal Court upon Sec. 240(2) and 243 of the
Govt. of India Act, 1935, it is desirable to amend
sec 29 of the Dist. Police Act suitably. Necessary
action may be taken to amend the said sec 29 in
consultation with the Inspector General of
Police.

107
28/10
S.E.

Pl. see notes at Slips J to C in Adaptations
File Appendix B, Bombay Code Vol. III. It cannot be
said that the question of making any adaptation in
section 29/Sub-section (1) of Sec. 29 was specifically adapted of the Bombay
and it was expressly held that it was not considered police Act, 1890
was considered.

necessary to make any adaptation of sub-section (3) of Sec- 29 This is further supported by the statement made in paragraph of H.L.A.'s opinion 59-p dated the 3rd July 1937 clip

Z File C, Government of India /37 Part II in which it was stated that none of the adaptations made in the Bombay District Police Act, 1890

Police Act, 1890 are consequential upon the provisions of section 240(2) of the Government of India Act, 1935 (P.L.), see portion marked at A) [3] Nor can it be said that it was for want of an authoritative ruling on the interpretation of sections 240(2) and 243 of the Constitution Act, for the distinction between the two provisions namely, those relating to appointments to a post or service and those relating to conditions of service was specifically noticed in the same opinion in para. 3 and para 13. 2. On the merits, the view taken by the Sind Government that section 29(3) of the Bombay District Police Act, 1890, conflicts with the provisions of section 240(2) of the Constitution Act, and therefore requires to be suitably amended is correct. Under section 9 of the Bombay District Police Act, 1890, before it was adapted by the Adaptation Order, power to make appointments of police officers of the grades of head-constable and constable was vested in the District Superintendent of Police. Although the section was omitted by the Adaptation Order, the provision was kept in operation by H.D. notification No. 1527/33-B dated the

A Copy of the order could not be obtained informally from H.D. 1st April 1937. It is understood from H.D. that fresh orders have been issued on 15th July 1939, which continue to vest the power of making appointments of police officers of the grades of head-constable and constable in the D.S.P. and of higher police officers such as

Inspectors, Sub-Inspectors and Sergeants in the
I.G.P.

2. Sub-section (3) of section 29 provides that a District Superintendent shall have the like authority (that is to say that he can suspend, reduce and dismiss, (in respect of any any police-officer subordinate to him below the grade of inspector. It provides further that the Central Police Training School, Nasik, shall also have the like authority in respect of the Police force below the grade of Inspector serving under him etc. In so far therefore as this provisions gives power to the District Superintendent of Police or the Principal of the Central Police Training School, Nasik, to dismiss a police officers higher in rank than head-constable such as Sub-Inspector or sergeant, whom the D.S.P. and the Principal have no power to appoint, it conflicts with the provisions of sub-section(2) of section 240 of the Constitution Act and therefore requires to ~~the~~ be suitably adapted.

It is understood that the Principal is of the rank of the D.S.P.

Id/-

29/10

Government Order in the Home Department No. 7817/3/II

(b), dated the 15th July 1939 issued under section 241(1)(B) of the Government of India Act, 1935, empowers the Inspector General of Police to make appointments to certain posts in the subordinate ranks of the police force in the Province of Bombay excluding Bombay City, namely, the posts of (1) Inspectors of Police, (2) Police Prosecutors, (3) Sub-Inspectors of Police ^{(4) Sergeants. It also empowers Superintendents of Police} to make appointments of Head Constables and Constables; but it does not give the Deputy Inspector-General of Police or the Principal of the Central Police Training School, Nasik, any power to appoint any member of the subordinate ranks of the police force.

2. Under section 29 of the Bombay District Police Act, 1890, however, the Inspector-General and Deputy Inspector-General of Police have power to punish any member of the subordinate ranks of the police force of, and below the grade of Inspector. In like manner a District Superintendent of Police has power to punish any police officer subordinate to him below the grade of Inspector. The Principal of the Central Police Training School, Nasik, also has power to punish any member of the subordinate ranks of the police force below the grade of Inspector serving under him and Head Constables, and Constables attached to the School for duty under him. In view of subsection (1) of section 29 the power of punishment includes the power of dismissal.

3. In view of the Federal Court's ruling in the case of Suraj Narain Anand V ^{Nath} The West Frontier Province, I.L.R. (Karachi) Series, 165, section 29 will have to be read subject to the provisions of section 240(2) of the Government of India Act, 1935 and therefore the Deputy Inspector General of Police will not be competent to dismiss any

police officer appointed by the Inspector General of Police.

The Principal of the Central Police Training School will likewise not be competent to dismiss any member of the of the subordinate ranks of the police force; nor, will the Superintendent of Police be competent to dismiss any member of the subordinate ranks of the police force above the rank of a Head Constable, for these officers have not been given the power to appoint such members of the subordinate ranks.

4. It may however be more expedient for Government under section 241(1)(b) of the Government of India Act, 1935 to delegate in future to the Deputy Inspector-General the Principal of the Central Police Training School and the Superintendent of Police the power of appointing any member of the subordinate ranks of the police force of, and below the grade of an Inspector. Instead therefore of amending the Police Acts over and over now and then to suit an order that Government may from time to time pass under section 241(1)(b) the better course would be for Government to make a rule or an order under the last sentence of sub-section (3) of section 29 directing that no police officer shall be dismissed from service by any authority subordinate to the one by which he was appointed.

Sd/-

27/11

Remembrancer of Legal Affairs

U.R. to H.D., No 9555 dated the 28th November 1942.

Submitted.

The facts as stated in the letter from the Govt. of India, Dept. of Supply are as follows:

Hattersley Mills, Ghatkepar, were originally owned by the Hattersley Mills Co. Ltd. As the Mills had been mortgaged in 1923 in favour of the debenture trustees (the Gwalior Durbar) On the Company's liquidation in 1925 they were taken possession of by the Durbar. On 16-10-40, the Gwalior Durbar made a free gift of their interests in the Mills in favour of the Govt. of India and they also taking steps to transfer the debentures to the Govt. Of India. The Govt of India state that since the Hattersley Mills Co. Ltd. has been dissolved, the mortgagor's equity of redemption vested in the Crown as bona vacantia, and that as the property is situate in the Province of Bombay, the Govt. of Bombay should claim equity of redemption in respect of the property and assign the same to the Govt. of India.

2. It is not clear on what point R.L.A.'s advice is sought. From the note of Secy G.D. dt. 16.11.42, it however appears that the question for consideration is whether the equity of redemption has vested in the Govt. of Bombay and if so, how.

3. The Company's power of borrowing is determined by the Memorandum of Association of the Company. Money may be Borrowed from

or others, on deposit of title-deeds
other securities or by mortgage of Property of
the Company.] If the money is required for a longer
period, the usual course is to obtain¹
it on debentures.¹ The mortgage issued
by a company very commonly take the form of either
debentures or debenture stock.¹ Debentures very often
secured by a trust-deed by which the property is
mortgaged to trustees for debenture-holders upon
trust, if the company makes default, to sell and
pay off the debentures (on. 16 and 17 of Companies
Act by Sincor and sen).¹ Such deed evincing the
mortgage or charge created of the Company should ~~have~~
have been registered under section 109 of the
Indian Companies Act, 1913 [The conditions govern-
ing the rights and relationship between the parties
should have been embodied in the trust deed.]

4 It is not clear whether the winding up of the
Hattersley Mills Co. was by the Court (sec. 162) or
whether it was voluntary (sec. 103) or subject to
the supervision of the court (sec. ²²¹203). ~~xxxxxx~~ It is not
clear how the Gwalior Durbar came in possession of
the Mills.¹ Perhaps the trust-deed and the liquidation
proceedings may be called for from the Registrar~~ate~~
of Companies.¹ It is however, presumed that the
liquidator did not surrender the equity of redem-
tion in the mortgaged property to the mortgage, the
Gwalior Durbar, or parted with it to any other person.
If that be so, and that is what appears to be stated
in the letter from the Govt of India, then it may

be stated that under section 174 of the Government
of India Act, 1935, the equity of redemption in the
~~of the property, the equity of redemption in the~~

mortgaged property vested in His Majesty as h.
 vacantia for the purposes of the Government of ~~the~~
 this Province from the date the company was
 dissolved. In re. Sir Thomas Spencer Wells (1933)
 1Ch. p. 29) it has been held that the equity of
 redemption in the mortgaged premises passed to the
 Crown as bona vacantia on the dissolution of the
 Co. The view of the Government of India that the
 equity of redemption has escheated to and vests
 in His Majesty for the purposes of the
 Government of ~~purposes of the Government of~~ this
 province appears to be correct.

S1/-

19/11

S.A.S.

(The facts of this case are not quite clear)
 Section 174 of the Government of India
 Act, 1935 provides that subject as herein-
 after provided, any property in India accru-
 ing to His Majesty by escheat, lapse or an
bona vacantia for want of a rightful owner,
 shall if it property situate in a Province,
 vest in His Majesty for the purposes of the
 Govt. of that Province and shall in any other
 case vest in His Majesty for the purposes of
 the Govt. of the Federation. A Company regis-
 tered under the Companies Act, 1913 can be
 dissolved under section 194 and of after dis-
 solution there remains any surplus in the
 hands of the liquidator, in the absence of
 any other claim to the said sums, it escheates
 to the Crown (see In re Higginson & Co. Deane,

1499, 1 Q.B.325); and the doctrine of bona vacantia extends to lease holds and other estate in land (In re Sir Thos. Spencer Wells, 1933 1 Ch 29). In (1933) 1 Ch 22 It was held that the equity of redemption in the mortgaged premises passed to the Crown as bona vacantia on the dissolution of the Company where the Co. was dissolved without property disposing of the said equity of redemption. Consequently in the present case the Hattersley Hills Co. Ltd. was dissolved without property disposing of the equity of redemption of the Hills, the Govt. of Bombay could claim the equity of redemption as bona vacantia.

Sd/

20/11

A.L.R.]

I agree.

Reply may be as S.A.3's note

Sd/-

23/11

R.L.A.]

Sd/-

24/11

U.R. to G.D. No. 9452 dated 25-11-42

R.L. No. 11699/18-11-42

Submitted

Attention is invited to the concluding portion of R.L.A.'s opinion No 5904, dated 20th July 1942 in which the R.L.A. had advised that there was no legal objection to Govt. transferring to the B.R.T. the jurisdiction conferred by sec. 60A of the Bombay Abkari Act, 1878. The Commr. of Excise however considers that from an administrative point of view such jurisdiction should not be transferred to the B.R.T. The question raised by Secy., R.D., for the consideration for the R.L.A. is whether Govt can decline to transfer the revisional powers under sec. 60A of the Abkari Act to the B.R.T. and whether such a course will be consistent with Sec. 296(1) of the Govt. of India Act, 1935. The Secretary, R.D.'s view appears to be that a Minister of the Crown who will be a member of one of the house of the Legislature cannot exercise the powers under sec. 60A of the Abkari Act without violating sec. 296(1).

2. Section 60A of the Bombay Abkari Act, 1878, which has introduced by Bom. Act No. XV of 1941, gives power to the Provl. Govt. to call for and examine the record of any proceedings before any Abkari officer and to revise any order passed by such an officer. It is true section 296(1) of the

Govt.¹ of India Act, 1935, forbids a member of a Provincial Legislature from being a member of any tribunal in British India,

having jurisdiction to entertain appeals or revise decisions in Revenue cases.

Although cases coming within the purview of section 60-A of the Abkari Act

may be revenue cases it does not appear

that a Minister of the Crown revisiting an order under that section can be considered

to be a member of a tribunal.¹ The B.R.T.¹

is a revenue Court (cf.¹ para 2 of R.L.A.

opinion No. 4513, dated 1-5-42); that is

not however the case with a Minister

disposing of a case in revision under sec.¹

60-A of the Abkari Act.¹ Under sub-section

(2) of sec 296 of the Govt.¹ of India Act a

tribunal was required to be constituted

for exercising such jurisdiction to enter —

tain appeals or revise decisions in Revenue

cases as vested in the Local Govt immediately

before the commencement of Part III

until other provision was made by an Act of

the Provincial Govt.¹ As observed by the

Solr.¹ General while explaining Sec. 296

"When the Govt.¹ becomes responsible to a

legislature it will be obviously undesirable

that the Govt. should decide Revenue

cases in which itself is involved and the

intention of the clause is to constitute a tribunal

(vide p. 306 of Iyengar's Govt. of India Act) :

The present tribunal derives its jurisdiction from the Bombay Revenue Tribunal Act, 1939 (sec. 4(1) and (2) of that Act).

Although sub-section (3) of sec. 4 of that Act empowers the Provl. Govt. to vest any further jurisdiction vesting in it (the Provl. Govt) in the B.R.T. the Govt. of India Act does not prescribe for the vesting of jurisdiction accruing after the commencement of Part III. The Govt. of India Act does not thus debar the vesting of new jurisdiction (such as that given by section 60A) in the Provincial Govt. There —

fore it does not appear there would be of the anything inconsistent with sec. 296 (1) of the Jurisdiction under sec. 60A of the

Abkari Act is not transferred to the B.R.T.

Sd/-

25/11

Ltr/11/4

Office of the R.L.A.

Revisional powers under section 60A of the Bombay Abkari Act, 1878, inserted by Bom. A. t XV 1941, have been vested in the Provincial Government subsequent to 1st April 1937. They cannot therefore be exercised by the Bombay Revenue Tribunal unless the jurisdiction to exercise the same is transferred to it a notification issued by Government under section 4(3) of the Bombay Revenue Tribunal Act 1939. Under section 4(3) it is the discretion of the Provincial Government to transfer such jurisdiction. The Provincial Government in whom this jurisdiction is vested by section 60A of the Abkari Act is not a tribunal within the meaning of section 296 of the Government of India Act, 1935; and even assuming that it is a tribunal, the Provincial Government qua such Government, being something different from an individual minister or the council of ministers, (see sections 49 and 50 of the Government of India Act, 1935) is not a member of the Provincial Legislature for the purposes of sub-sections (1) of section 296; consequently the provisions of sub-section 296 do not apply to it. It is not therefore obligatory on the part of Government to transfer the revisional powers vested in it by section 60A of the Abkari Act to the Revenue Tribunal, but it will be for the Revenue Department to consider whether, in view of the general intention of Parliament in the matter of setting up of revenue tribunals it would be proper to decline to transfer it revisional powers under section 60A to the Revenue Tribunal set up by the Bombay Revenue Tribunal Act. In explaining the object of sub-section (2) of section 296 the Solicitor General stated as follows in the House of Commons when the Government of India Bill was passing through the Committee stage: "The clause contemplates that the

Legislature ought to set up and must set up tribunals to deal with revenue matters. At present such matters are in effect dealt with by the Executive but that is not a proper permanent procedure, especially when the Executive in future, instead of being, as it is at present partly an official body, will be wholly dependent on the Legislature. I think that it is desirable that a tribunal should be set up to deal with

these matters. (Parliamentary Debates Vol 300 column 1038)

Although during the Proclamation period there is no Legislature functioning it would be for the Government to decide as a matter of policy whether to transfer the revisional powers vested in it under section 60A of the Abkari Act to the Revenue Tribunal immediately or to wait till the Legislature begins to function.

Sd/-

12/12

Remembrancer of Legal Affairs.

U.R. to the R.D., No. 9951 dated the 12th December 1942.

Mr/11/4

Office of the Public
Prosecutor for Bombay
51 Esplanade Road Fort
Bombay 1st June 1942

Dear Mr. Burdeshwar.

I shall be obliged if you will please enlighten me as regards a point which has arisen in certain cases under Ordinance II of 1940.

2. Mr. F.G.R. Khaira Bar-at-law who is conducting all the cases from the National Service Labour Tribunal informs me that a point has been taken that Ordinance II of 1940 under which the accused are charged expired six months after its promulgation, that is somewhere about March 1941 and any acts in contravention of that Ordinance after March 1941 would not be offences in as much as the Ordinance was not re-promulgated.

3. Will you kindly let me know what the provision relating to Ordinance which under the Government of India Act or Promulgated for six months only. Have they been re-promulgated?

I shall be obliged if you will let me have an answer early as the cases are fixed some time next week.

Yours sincerely,
Sd/ N. K. Pethigara

B.G. Burdeshwar Esq.
Legal Dept.

11
No. 4554

Legal Department.

Bombay Castle, 3rd June 1942

Dear,

With reference to your D.O. of the 1st instant,
the position, as I see it, is as follows:-

The Ordinance was issued under section 72 of the Government of India Act as amended and continued under section 317 of the Government of India Act, 1935, read with Schedule IX thereto (See Gazette of India, Extraordinary, 29th June 1940) By the India and Burma (Emergency Provisions) Act, 1940 Ordinances made under the said section 72 during the period beginning with the date of the passing of the Emergency Provisions Act and ending with such date as might be subsequently declared to be the end of the emergency which was the occasion of its passing, were freed from the 6 months limit imposed on their duration. Hence Ordinance II of 1940 which was made after the passing of the Emergency Provisions Act, did not cease to have effect after six months.

Yours

20/- B. G. M.
3/7

To. N.K. Patigara, Esquire, B.A., LL.B.,

Public Prosecutor For Bombay

Mr/11/4

The question raised for consideration of the Resemblance of Legal Affairs is, —

Whether the Provincial Government is competent to enact a law validating marriages performed in contravention of section 4 of the Indian Christian Marriage Act 1872?

2. Under sub-section (2) of section 100 of the Government of India Act, 1935 a Provincial Legislature has power to make laws with respect to any of the matters enumerated in the Concurrent Legislative List in the Seventh Schedule. Marriage and divorce are mentioned as subjects falling under Entry 6 in the Concurrent Legislative List. The Provincial Legislature will therefore be competent to pass any law relating to this subject. Sub-section (1) of section 107 provides that if any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to any of the matters enumerated in the Concurrent Legislative List, then subject to the provisions of that section the existing Indian law shall prevail and the Provincial law shall, to the extent of the repugnancy, be void. As the proposed law would be validating certain marriages performed in contravention of the Provisions of section 4 of the Indian Christian Marriage Act, 1872, it would clearly be repugnant to the provisions of an existing Indian law. But sub-section (2) of section 107 makes provision for overcoming repugnancy. The expression "subject to the provisions of this section" in section 107(1) refers to those provisions in sub-section (2) under which on certain conditions being satisfied, a Provincial law although repugnant to an "existing Indian law" may yet have effect in the Province in which it was enacted. If therefore after the validating Act is made by the Governor, it is reserved for the consideration of the Governor General and his assent is obtained under section 107(2),

the Act will prevail in the Province of Bombay until the Federal Legislature thinks fit to legislate further with respect to the same matter.

Sd/-

23/5

Remembrancer of Legal Affairs.

U.R. to G.D., No. 4291, dated the 25th May 1942.

Mr/11/4

The question raised for consideration of the R.L.A. is whether the validating Act in this case should be a Provincial one or a Central one.

2. As pointed out in the last opinion of the R.L.A. No. 4291 Dated 25/2/42 at p 9-10 ante, since the marriage in this case was performed within the Province of Bombay and the subject 'marriage' falls in the Concurrent Legislative List in the seventh Schedule to the Government of India Act, it is competent to enact a Provincial law in this Province validating the marriage. Under section 99(1) of the Act, however, a Provincial Legislature may make laws for the Province or for any part thereof. Under the Government of India Act, therefore the Provincial law will have no operation in any other part of India and the validating Act, will not consequently have any effect outside the Province. Under section 99(1) of the Government of India Act, the Federal Legislature is competent to make laws for the whole of the British India and a validating Act of the Central Legislature will be effectual throughout British India.

3. Section 1 of colonial Marriages Act, 1865 28 and 29 V.C.4, provides that every law made or to be made by the Legislature of any of Her Majesty's possessions for the purpose of establishing the validity of any marriage contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of Her Majesty's Dominions as such law may have had or may hereafter have within the possession for which the same was made, provided at the time of such marriage both of the parties were, according to the law

of England, competent to contract the same, "India" is one of Her Majesty's possessions and this section applies to India. Under the section therefore, a law made by the Central Legislature for the purpose of establishing the validity of a marriage will have force within all parts of Her Majesty's Dominions. A Central enactment in this case will, therefore, have effect in all the British Dominions. As the marriage would thus be validated according to recognised principles of International law, it will be recognised all the world over (see *Fumane Berthiaume vs. Dame Destous* A.C. 1930, P. 2 at p. 83)

4. Section 2 of the colonial marriages Act, 1865 refers to every law made by the Legislature of any of Her Majesty's possessions. ^{The expression 'legislature' is not defined in this Act} ~~And~~ section 18(3) of the Interpretation Act, 1889, it means when used with reference to a British possession the authority other than the Imperial Parliament or Her Majesty's Council, competent to make laws for a British possession of the Act, where parts of Her Majesty's Dominions both a Central and a local legislature, all parts of a Central Legislature shall be deemed to be one ~~Central~~ possession. If these definitions of 'legislature' were to apply to the Colonial Marriages Act, 1865 it would appear that the proper authority to enact the validating legislation in this case would be the Central Legislature. But under section 18 of the Interpretation Act these definitions do not apply to Acts passed before the commencement of that Act and therefore ~~to the~~ Colonial Marriages Act. The result is there is no clear definition of the expression 'legislature' used in section 2 of Colonial Marriages Act.

It is not clear whether it can be held to include a local legislature of a part of a possession of Her Majesty. There is no doubt that it would include the Central Legislature. To be on the safe side, therefore, it would be preferable to have Central Legislation in this case.

5. Furthermore, an Act made by the Governor during the section 93 regime has temporary validity under section 93(4) of the Government of India Act, 1935, unless reenacted by the Provincial Legislature. It is desirable in order that the validating Act may have a permanent effect that the legislation should be undertaken by the Central Legislature.

Sd/-

14/8

Remembrances of Legal Affairs,

U.R. to G.D.

ced the 14th August 1942

passed by the

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